FILED
MAR 29 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 683

ALBERT GREGOR KAMMERER, *Petitioner,*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THURMAN ARNOLD
1229 19th Street, N.W.
Washington 6, D.C.

E. WAY HIGHSMITH,
Brunswick, Georgia
Attorneys for Petitioner.

ARNOLD, FORTAS & PORTER,
1229 19th Street, N.W.,
Washington 6, D. C.

HIGHSMITH & HIGHSMITH,
Brunswick, Georgia.
Of Counsel.

March, 1955.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

BLEED THROUGH POOR COPY

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons for Granting the Writ	8
Conclusion	15

Appendix A	1
Appendix B	9
Appendix C	17

TABLE OF AUTHORITIES

Diggs v. *United States*, 220 Fed. 545 (C.A. 9, 1915) ...9, 13
Dunlop v. *United States*, 165 U.S. 486 14
Fleming v. *Husted*, 164 F. 2d 65 (C.A. 8, 1947) 8
Landay v. *United States*, 108 F. 2d 698 (C.A. 6, 1939) .. 8, 9
Murphy v. *Lehigh Valley R. Co.*, 158 F. 2d 481 (C.A. 2, 1946) 9
Ocean Accident & Guarantee Corp. v. *Penick & Ford*, 101 F. 2d 493 (C.A. 8, 1939) 9
St. Louis Smelting & Refining Co. v. *Henke*, 277 Fed. 665 (C.A. 7, 1922) 9
Smith v. *Philadelphia Transp. Co.*, 173 F. 2d 721 (C.A. 3, 1949) 14
Stanczak v. *Pennsylvania R. Co.*, 174 F. 2d 43 (C.A. 7, 1949) 8
United States v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (C.A. 2, 1946) 8
United States v. *Cohen*, 177 F. 2d 523 (C.A. 2, 1949) .. 8
United States v. *Goodman*, 110 F. 2d 390 (C.A. 7, 1940) 8
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 8, 13
Twachtman v. *Connelly*, 106 F. 2d 501 (C.A. 6, 1939) ..8, 13
Washington & O. D. Ry Co. v. *Smith*, 289 Fed. 582 (C.A.D.C. 1923) 9
Washington Times Co. v. *Bonner*, 86 F. 2d 836 (C.A. D.C. 1936) 8

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

ALBERT GREGOR KAMMERER, *Petitioner,*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Albert Gregor Kammerer prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on January 7, 1955.

OPINIONS BELOW

The opinion of the District Court on post-trial motions (Appendix A hereto) (R. 29-39) is not reported. The opinion of the Court of Appeals (Appendix B hereto) (R.

710) is reported in 218 F.2d 149. The opinion of the Court of Appeals on the first appeal is reported in 205 F.2d 525.

JURISDICTION

The judgment of the Court of Appeals (Appendix C hereto) was entered on January 7, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Was the Court of Appeals justified in ordering a third trial in a jury case on the sole ground that argument by plaintiff's counsel might have prejudiced the jury, where liability was fully established and where the trial judge had specifically and clearly instructed the jury to consider only the evidence before it and to disregard arguments of counsel?

2. Where liability was plain and the jury verdict was not subject to attack on the merits, did the Court of Appeals usurp the function of the jury and the District Court by reversing because it objected to argument by plaintiff's counsel?

STATEMENT

This is an action for wrongful death, brought by the father of the deceased in the United States District Court for the Southern District of Georgia. Jurisdiction was based on diversity of citizenship. The case has been tried twice before a jury: each time the jury has found a verdict of $50,000 for the plaintiff (Petitioner here) and each time the judgment has been reversed by the Court of Appeals.

The facts are as follows:

Petitioner's twenty-four year old son was killed one night in August, 1951, when the automobile he was driving struck a darkened engine and box car parked directly across a well-travelled street in Brunswick, Georgia (R. 200-7, 245-7, 358-9, 420). The crossing was unlighted and

BLEED THROUGH POOR COPY

the only warnings at the crossing were rectangular painted signs which did not comply with Georgia law either as to shape or visibility, and in addition were partially obscured by overhanging branches and moss (R. 231-2, 404-7, 420-1, 446). Some years prior to the accident the track had ceased to be used as a main line and its only use at the time of the accident was for occasional switching operations generally carried on after midnight (R. 400-2, 437-8, 449-52).

On the night that young Kammerer was killed, an engine and a box car in front of it were brought up along the track and parked directly across the grade crossing while the conductor got out to inspect two box cars standing just beyond the crossing (R. 355-62, 520-21). The train was dark and no light was visible from the street (R. 301, 310, 464). No flares were set out as signals. Overhanging tree limbs and shadows cast by the moon further camouflaged the darkened train (R. 239-40, 276-7, 336-7). Petitioner's son, driving alone, crashed straight into the train apparently without even enough warning to swerve or to apply the brakes (R. 300, 361).

These essential facts of Petitioner's case were uncontradicted and indeed largely based on the testimony of defendant's own employees. (E.g., R. 347-429.) In overruling post-trial motions, the trial judge stated that in his opinion "the Jury was authorized to find that plaintiff's 24-year-old son was killed as a result of the wanton negligence of the defendant . . ." (R. 38).

This too was the opinion of Rives, J., dissenting from the reversal of the first judgment as follows, 205 F.2d at 526:

> "In my opinion, the jury were authorized to find that the appellee's twenty-four year old son had been *wantonly killed* by appellant's servants. The track was a spur track abandoned in 1949 and the re-use of which had begun only a few months before the fatal accident without any new warning signs or notice to the public. There was no necessity for blocking the street. The

> engine with one box car attached had been stopped clear of the street, and then instead of the conductor's walking across the street to inspect the car on the opposite side and ascertain whether it was empty, he had the engine to start again and continue its movement until the street was completely blocked by a box car and engine with the headlight of the engine admittedly not burning. As the conductor opened the door of the box car, the fatal crash occurred.'"[1] (Emphasis supplied)

Nor did the judges who reversed both judgments doubt the railroad's negligence. The first reversal was for instructions on the possibility that the deceased may also have been negligent.[2] The court required that on this issue the jury be instructed that the deceased was the cause of his own death if he was driving too fast to stop within the distance of his lights and if properly working lights would have revealed the engine. The required instruction on this subject having been given at the second trial and the jury verdict again being for plaintiff, the second reversal did not deal with the question of liability at all.[3]

Indeed the defense was quite weak, consisting almost exclusively of some testimony that the car was travelling fast (R. 30, 501-510), and an abortive attempt to intimate without proof that the deceased may have been drinking (R. 30, 362, 488).

Defense counsel on the second trial made several demands for mistrial and a number of objections to parts of

---

[1] Judge Rives did not sit on the panel on the appeal from the second judgment. Judge Holmes, who wrote both opinions, was the only member common to both panels.

[2] See 205 F. 2d at 526. The issue would then be the comparative fault of the parties, contributory negligence not being a complete defense under Georgia law.

[3] Except for a brief reiteration from the first opinion that "the real question as to liability is one of comparative negligence". (R. 711)

BLEED THROUGH POOR COPY

the opening and closing statements of plaintiff's counsel.[4] In the course of denying the motions for mistrial, the court advised the jury on each occasion that they must disregard statements of counsel not supported by evidence.[5]

In the course of the week long trial the defense made the following objections to opening and closing statements:

In his opening statement, (1) plaintiff's counsel stated to the jury that "this young man was killed by the most inexcusable negligence that they [the jury] have ever experienced in the Court house." (R. 142). The court on motion for a mistrial instructed the jury to confine itself to the evidence. (2) Counsel stated: "I have no prejudice or bias against the railroad of any kind. I have been counsel for the Southern Railroad myself." (R. 143).[6]

---

[4] He was apparently influenced in doing so by statements in the Court of Appeals opinion on the first reversal to the effect that opening statements should be limited to a statement of intended proof without argumentation, 205 F. 2d at 525. On the first trial, plaintiff's counsel made a much stronger plea without objection from the defense. (Id.) Judge Rives, dissenting, stated: "Under the facts of this case, I think that the defendant's counsel may have been well advised in not objecting to the plaintiff's opening statement or to the oral charge of the District Court. Read as a whole, that charge seems to me a fair and able presentation of the issues to the jury."

[5] Defense counsel was himself not immune to the normal tendency of counsel to engage in advocacy. Despite the brevity of his opening statement, it was necessary for the court to point out that he was indulging in the same type of argument and "witnessing" in his opening to which he objected on the part of plaintiff's counsel (R. 172).

[6] In its opinion quoting this statement the Court of Appeals did not note that it had been invited by an accusation of the defense (R. 141, 143). The full paragraph is as follows:

> "Now, Mr. Conyers, has already started objecting, saying that I am telling you that because it is a railroad company you should return a verdict for the plaintiff. I want to relieve your minds of that completely. We don't want one cent more in this case than the plaintiff is entitled to. I have no prejudice or bias against the railroad of any kind. I have been counsel for the Southern Railroad myself—" (R. 143).

(3) Objection was made that a statement by counsel on the law of damages was argumentative (R. 151). (4) Counsel read the complaint and commented on it. The defense asked for a mistrial on the ground that he was not confining himself to an outline of the facts but was actually arguing the case (R. 160, 174). The court advised the jury that they should consider counsel's statement only to the extent that it was confined to facts he intended to prove (R. 161, 174-175).

In the closing argument, (1) counsel cited the fact that farmers must fence their land to keep livestock off the highway, to show that the railroad also owed care in keeping its trains off the highway. The Court told the jury to ignore this statement (R. 637-638). (2) Counsel stated that three other persons had been killed in similar fashion and the court *promptly and specifically* directed the jury that other accidents were not admissible and the jury must confine themselves to the evidence in the present case without considering any statement of counsel (R. 660, 661, quoted in the opinion of the Court of Appeals, R. 717-719). (3) He also asked for a verdict that would shock the company into compliance with its obligations, and the court instructed the jury to disregard that statement (R. 675-6).

Further, at the very beginning of his charge, the trial judge told the jury:

> "Now, gentlemen of the jury, before I commence to charge you, I want to instruct you to disregard any statements made by counsel relative to any matter other than the evidence that has been presented to you. Now, sometimes counsel may inadvertently make some statement that has no connection whatsoever with the case on trial, but you disregard any such statements and confine yourself solely to the evidence as presented in this case and the law as given you in charge by the Court. You just disregard entirely any statements that might have been made by either counsel in this case that is not supported by the evidence in this case." (R. 678)

BLEED THROUGH POOR COPY

Following the jury's verdict, the Court overruled a motion for judgment n.o.v. and for a new trial, noting, *inter alia,* that "the Court took extraordinary pains upon the second trial to admonish the jury that they were not to consider any remarks made by counsel for either side which did not bear directly on the issues . . ." (R. 32).

On appeal, the court below found that the district court had let the trial "get out of bounds". It stated that in his opening speech the plaintiff's attorney "did not confine himself to a simple statement of the issues presented by the pleadings, or to the facts that he intended to prove by the witnesses" but made "an inflammatory speech to the jury upon the merits of the case, discussing both the law and the facts in strong language and stating facts that would be clearly inadmissible in evidence." (R. 711). It held this to be prejudicial because it could not assume that the jurors would remember the District Court's instructions to disregard what they had been told to disregard (R. 716). The Court of Appeals devoted its entire attention to the plaintiff's opening statement, with some comment on the closing statement. It made no mention of the overwhelming case presented by plaintiff on the merits. It ignored completely both the testimony and the facts demonstrating the trial judge's firm control of the proceedings. Instead it cited the objections mentioned above and placed great emphasis on a series of remarks of counsel as prejudicial, one of which was actually made *out of the hearing of the jury* and others of which, *not objected to by the defense,* were statements of facts plaintiff "intended to prove" and later actually proved by witnesses. (See pp. 11-13 infra.)

The Court of Appeals reversed for a third trial. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals usurps the functions of the District Court and trenches on those of the jury in direct conflict with rulings of this Court and of other Courts of Appeals. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-243; and, e.g., *Twachtman* v. *Connelly*, 106 F.2d 501, 509 (C.A. 6, 1939); *United States* v. *Goodman*, 110 F.2d 390, 394-395 (C.A. 7, 1940); *Washington Times Co.* v. *Bonner*, 86 F.2d 836, 848-849 (C.A.D.C., 1936). It is universally held that it is the function of the district judge, who has observed the trial throughout, to determine whether argument of counsel requires any corrective action, and, if so, what action is needed. This determination depends on factors which cannot be effectively evaluated by courts of appeals from a printed record. *United States* v. *Goodman*, 110 F.2d 390, 394-395 (C.A. 7, 1940). Except in the most extreme cases, courts of appeals must refrain from substituting their own judgment for that of trial judges on questions arising from argument of counsel, especially where, as here, the trial judge has actually taken corrective action. *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 637-638 (C.A. 2, 1946); *United States* v. *Cohen*, 177 F.2d 523, 527 (C.A. 2, 1949); *Fleming* v. *Husted*, 164 F.2d 65, 68 (C.A. 8, 1947).

A basic reason for keeping control of argument of counsel in the hands of district judges is to make certain that the jury's role is not infringed. Where a verdict is solidly supported by the evidence and no errors of law have been committed, appellate court reversals based on the theory that the jury may have reached the wrong result through prejudice infringe the successful party's constitutional right to a jury trial—a right effectively denied Petitioner here. This is not a case where the evidence is so balanced that argument might be expected to affect the result. *Stanczak* v. *Pennsylvania R. Co.*, 174 F.2d 43, 47-48 (C.A. 7, 1949); *Landay* v. *United States*, 108 F.2d 698, 706 (C.A.

BLEED THROUGH POOR COPY

6, 1939). Rather it is one where the admitted facts clearly establish liability and it is most unlikely that improper statements by counsel affected the outcome. Moreover, defense counsel's repeated objections and the trial court's careful and immediate instructions to the jury in each instance were adequate to cope with improper argument had the case in fact been a close one. In these circumstances, the well-settled rule is that the jury's verdict, upheld by the trial judge, must be allowed to stand. See, *e.g.*, *Murphy* v. *Lehigh Valley R. Co.*, 158 F.2d 481, 484-485 (C.A. 2, 1946); *Ocean Accident & Guarantee Corp.* v. *Penick & Ford*, 101 F.2d 493, 500 (C.A. 8, 1939); *Washington & O. D. Ry. Co.* v. *Smith*, 289 Fed. 582, 588 (C.A.D.C., 1923); *St. Louis Smelting & Refining Co.* v. *Henke*, 277 Fed. 665, 667 (C.A. 7, 1922); *Diggs* v. *United States*, 220 Fed. 545, 555-557 (C.A. 9, 1915).

II.

The holding below that this trial got "out of bounds" is utterly unjustified on the record. The trial was conducted by an exceptionally able, experienced and respected judge who has lived all of his life in Brunswick and is noted for control of the proceedings in his court. Counsel for plaintiff and defendant were distinguished members of the local bar. Thus it is inherently incredible that the trial should have been such a disorderly procedure as described in the Court of Appeals opinion. In addition, such a conclusion is refuted by the record itself. The trial lasted a full week. The opening argument complained of was on the first day and lasted only an hour.[7] The trial produced 600 pages of printed record; in all of those pages there are relatively few objections by defense counsel and still fewer remarks which the Court of Appeals considered improper. The

[7] Court opened at 2 p.m. (R. 130). By 3:20 (by error stated in the record as 2:20 (R. 175)) the opening statements of plaintiff and defendant were concluded, including preliminary matters and discussion of law out of the hearing of the jury (R. 130-140).

trial court ruled promptly and decisively on all objections presented to it and conducted the trial with fairness and dispatch. Under the circumstances it is most unlikely that improper argumentation on Monday could have affected the jury's verdict rendered on Friday.

Furthermore, the evidence plainly established liability. The District judge said in denying post-trial motions:

> "This Court having heard the evidence in this case on two trials and having carefully observed the witnesses, considered their testimony, their manner of testifying and their demeanor on the stand, and having carefully studied the pictures, maps and other exhibits tendered in evidence, is of the opinion that the Jury was authorized to find that plaintiff's 24-year-old son was killed as the result of the wanton negligence of the defendant, its servants, agents and employees. The verdict rendered in the case on both trials was for a modest sum compared to what the jury would have been authorized to find under the law of Georgia considering the age, earning capacity and future prospects of the deceased as shown by the undisputed evidence. This Court is of the opinion that the verdict was fair and just under the facts of this case." (R. 38)

The District Court concluded that the trial was such that the verdict of the jury fairly reflected its judgment of the facts untainted by bias and prejudice.[8] This conclusion was based on a life-long familiarity with the local population from which the jury was selected and on personal knowledge of all the events of a week long trial. Certainly the Court of Appeals was in no position on the basis of a cold printed record to overrule this judgment.

The action of the Court of Appeals is the less excusable because the record shows that many of its strictures on the opening statement were unjustified and that the statement was in fact limited to a "statement of the issues" and the facts plaintiff "intended to prove by the witnesses."

---

[8] *Cf.* defense counsel's remark in both his opening and closing statements to the jury that "whatever verdict you bring in will be satisfactory to us" (R. 173, 660).

BLEED THROUGH POOR COPY

Thus, the Court of Appeals' opinion cites as prejudicial a number of remarks. They were in the main matters to which the defense, despite its frequent complaints in other respects, made no objection at the time they occurred, limiting itself to a subsequent objection to the whole statement (R. 160, 174).

(1) The opinion quotes counsel's characterization of the Georgia statute imposing liability for the full value of the life without deduction for living expenses as partly penal in character (R. 712; 136-37), disregarding the fact that the statement quoted, in addition to being a correct statement of Georgia law, was made *while the jury was excluded from the court and out of its hearing* (R. 136).[9] (2) The opinion objected to counsel's reference to the fact that petitioner is an invalid, although proof to this effect is a necessary element under Georgia law which permits recovery only upon a showing of dependency of the petitioner upon the deceased (R. 686-87).[10] (3) The appeals court objected to argument that the plaintiff was one of the most promising and finest young men in the City of Brunswick although on the record it was established by witnesses that he had supported his father, that he had a good war record,

---

[9] *Cf.* the fact that on the occasion of the first reversal the Court of Appeals criticized plaintiff's counsel for prejudicing the jury with the argument that only a railroad company could escape prosecution for such wanton negligence. 205 F. 2d at 525. An extensive petition for rehearing called to the attention of the Court of Appeals that this statement was not made to the jury at all, but only in the brief in the Court of Appeals itself. The petition for rehearing was denied without amendment of the opinion.

A copy of the record on the first appeal including the Petition for Rehearing will be filed in this Court.

[10] The Court of Appeals' opinion (R. 713) quoting from the opening statement replaces with asterisks the portions which would have made this clear. The record shows that the statement in full is that the deceased "was living with his invalid father *and upon whom his father was dependent and to whom he contributed, and was living in the same home.*" (R. 142-143) (Italic material omitted in the Court of Appeals opinion).

that he had had pre-law training, that he intended to practice law and that all of these facts were necessary elements of damages.[11] (4) The deceased's sobriety, reference to which was also criticized in the opinion, was the subject of actual proof (e.g., R. 176) made necessary by the unsuccessful attempt of the defendant to assert the contrary (R. 362, 488).[12] (5) The extensive quotation (R. 714-715) from the argument describing the trip of petitioner and counsel to the scene of the accident one month later under similar circumstances was a description of evidence actually produced at the trial (R. 233-242) establishing that at the same phase of the moon and the same time of night as the accident occurred, the crossing was in fact camouflaged by shadows cast by the moon.[13] The criticized statements were, as the record shows, statements of facts intended to be proved by witnesses and later actually so proved.[14]

---

[11] The opinion (R. 713) here again uses asterisks. The record reads: "*The proof will show* that he was one of the most promising and finest young men in the City of Brunswick" (R. 143). (Italic material omitted in the Court of Appeals opinion.)

Further use of asterisks in the same quotation conceals the fact that counsel's statement that he had been counsel for the Southern Railroad was invited by comment of defense counsel (R. 143, cf. also R. 141) see note 6, *supra*.

[12] The absence of any proof that deceased had been drinking and the overwhelming evidence of his sober habits was apparently overlooked by the Court of Appeals, for its opinion quotes out of context counsel's statement that the deceased was "absolutely sober on this occasion" in such a fashion as to convey the impression that the deceased was not a young man of sober habits. (For the full statement of counsel, see R. 146).

[13] The Court of Appeals apparently overlooked the portion of the record containing this proof, as is evidenced not only by its allegation that the opening statement was improper in this respect, but also by the statement in its opinion that the accident occurred "on a clear night with the moon, almost ready to set, shining through the large oak trees." (R. 711)

[14] The Court of Appeals objected to the length of the complaint read to the jury. It apparently agreed that it was proper to read

BLEED THROUGH POOR COPY

Thus the major part of the court's findings of prejudice to the jury was based either upon matter that was not before the jury at all, or on matters not objected to by defense counsel and in all events proper subject for an opening statement under the court's own standard.

III.

As we have seen, defense counsel did object to or request a mistrial because of some comments in the opening and closing statements and because the opening statement generally was "argumentative."

Counsel's argument was of course vigorous. But it was not at all as strong as the statements held out to have affected the verdict rendered in other cases. See, e.g., the *Socony-Vacuum Oil Co.*, *Diggs* and *Twachtman* cases, *supra.*

Further, this record reveals negligence that might easily call for stronger language than that employed by counsel in his opening and closing statements. Parking an unlighted train after midnight across a dark, inadequately marked grade crossing in a city is an act of wanton indifference to the safety of persons travelling the streets in automobiles.

There is no basis for a holding that prejudice resulted from the few comments which the court instructed the jury to disregard. On the few occasions when counsel mentioned matters outside the evidence, prompt correction was made by the court. Objections by defense counsel were ruled on immediately, at the time of the objection, with a clear instruction to the jury, of the extent to which the statements objected to were proper or should be disregarded. As this Court once observed:

---

the complaint to the jury in an opening statement but felt that the complaint was too lengthy. It did not advert to the fact that the original complaint was only two pages (R. 56-58) but that the defendant by motion insisted that the complaint be amended so as specifically to set forth all acts of negligence complained of. (R. 62)

> "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since, in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Dunlop* v. *United States,* 165 U.S. 486, 498.

Nor, we have seen, was the case a shaky one, likely to go either way on a turn of phrase. Counsel did not exaggerate in making the accident appear to be a tragic one. Read as a whole, the opening and closing speeches are not out of line, as the excerpts quoted by the Court of Appeals would suggest. As Judge Goodrich observed in *Smith* v. *Philadelphia Transp. Co.,* 173 F.2d 721, 726 (C.A. 3, 1949): "Juries are not so likely to get excited or inflamed by lawyers' talk as lawyers think they are." The plain facts of this case were far more likely to outrage the jury than any talk.

In refusing to let the verdict in the first trial stand, the Court of Appeals based its reversal on an error of law by the trial judge. The second trial was free from such error. The Court of Appeals' second reversal is not based on errors of law but on the presumption that the jury did not determine the facts fairly. The record in this case makes the conclusion insupportable.

IV.

This case has already been tried twice. A third trial has now been ordered. Yet liability is clear, and there is little reason to expect a different outcome in the trial court.

The principal result of the decision below is added hardship which is unnecessary under the well-established rule of this Court requiring that the trial judge be upheld in his use of judgment in guiding the trial, and that the jury's twice-made verdict on the facts be accepted. To safeguard the constitutional right to a jury trial, petitioner asks this Court to set down a standard that will instruct the Court

BLEED THROUGH POOR COPY

of Appeals that it exceeded the proper boundaries of its functions.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted, the judgment of the Court of Appeals reversed and the verdict of the jury reinstated.

Respectfully submitted,

THURMAN ARNOLD
1229 19th Street, N.W.
Washington 6, D.C.

E. WAY HIGHSMITH,
Brunswick, Georgia

Attorneys for Petitioner.

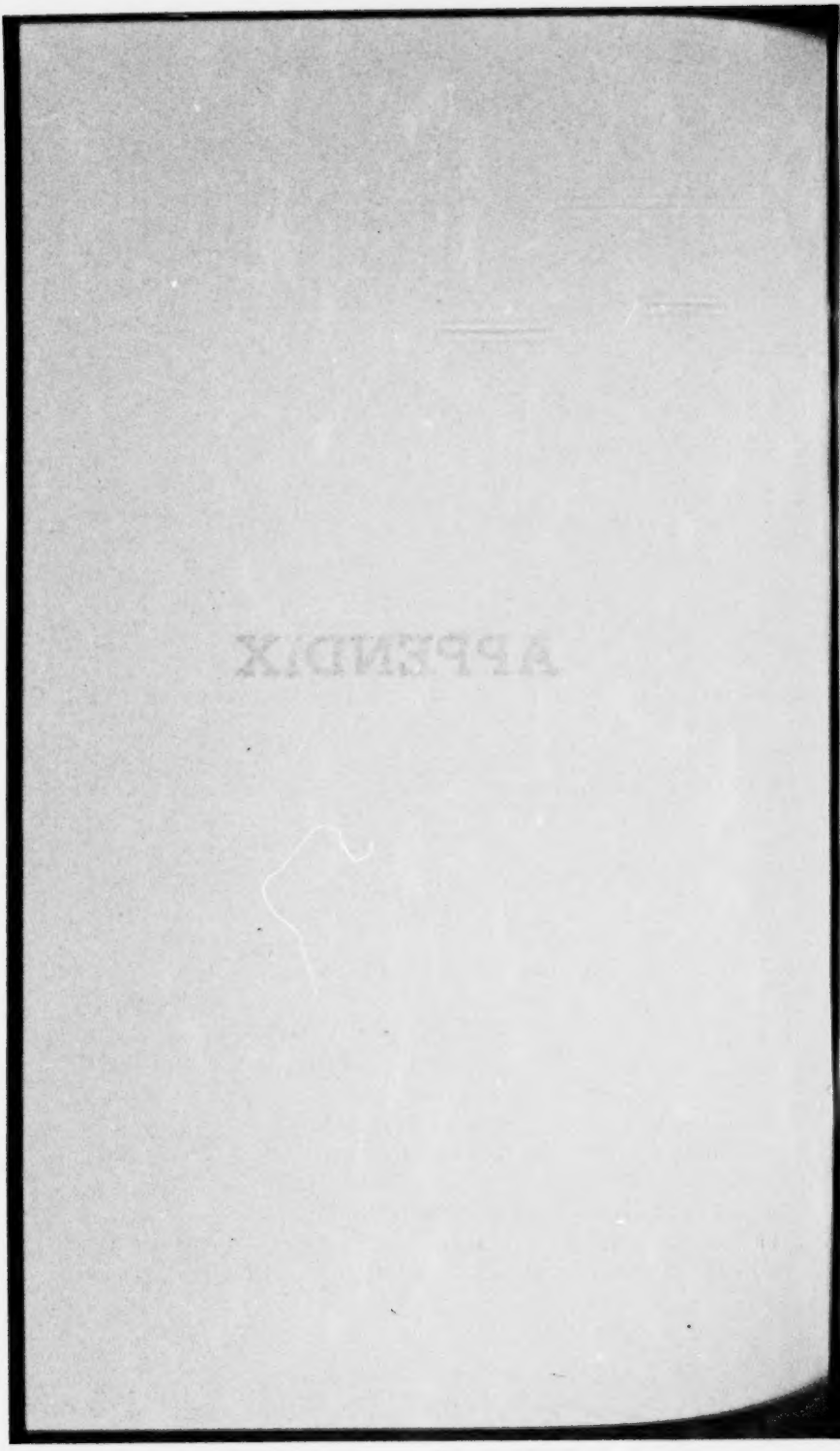
ARNOLD, FORTAS & PORTER,
1229 19th Street, N.W.,
Washington 6, D. C.

HIGHSMITH & HIGHSMITH,
Brunswick, Georgia.

Of Counsel.

March, 1955.

BLEED THROUGH POOR COPY



BLEED THROUGH POOR COPY

APPENDIX A

ORDER OVERRULING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND MOTION FOR NEW TRIAL

Filed Jan. 6, 1954.

(Title Omitted.)

This is the second trial of this case. Each trial resulted in a verdict for the plaintiff in the same amount.

In a two to one decision the Court of Appeals granted the defendant a new trial after the first verdict upon the ground that this Court erred in not charging two requests to charge made by the defendant. These charges were again requested upon the second trial and were charged in the language requested.

As to the motion for judgment notwithstanding the verdict and the motion for a new trial based upon the general grounds, no discussion is necessary, since the law of this case was fixed by the Court of Appeals. That Court held that the evidence on the first trial presented a case for the jury. This Court observed the demeanor of the witnesses, what they said and their manner of testifying during the second trial very carefully and, if anything, the case made by the plaintiff was stronger, and the defense made by the defendant weaker, than upon the first trial. In the second trial, as upon the first, the defendant practically admitted the principal acts of negligence complained, of, its chief defense being that the deceased driver of the automobile could have avoided the consequences of defendant's negligence by the exercise of ordinary care. The only ground of contributory negligence contended for at either trial, however, was speed in excess of the limit permitted by a City Ordinance, to-wit: thirty miles an hour. At the second trial, however, defendant's principal witness as to speed swore positively and unequivocally on cross-examina-

tion that a minute or a minute and a half elapsed from the time he first saw the car at "L" Street until the collision occurred. See B. of Ev., page 416. The uncontradicted evidence was that the distance from L Street to O. Street, the scene of the collision, is exactly one-half mile. See B. of Ev., page 494. This positive and direct testimony of defendant's own witnesses therefore put the speed of the car at not in excess of thirty miles per hour.

There was no charge of drinking against the deceased at either trial and no mention of liquor at the first trial, but upon the second trial two witnesses who testified at the first trial, one of them the defendant's agent, testified that a small bottle of whiskey was found in the car (which had been borrowed by deceased from a friend to make the fatal trip) after the accident, one saying that he found it in the car on the night of the accident, and the other saying that he saw a policeman take it out of the car the next day.

The evidence was abundantly ample for the jury to believe that because of the peculiar and unusual meteorological conditions existing at the time and place of the accident, caused by a setting moon casting the mottled shadows of a large oak tree upon the dark, unlighted railroad equipment at a dark crossing overhung with tree limbs, an optical illusion or camouflaged condition was created which made it impossible for the automobile driver, in the exercise of ordinary care, to ascertain that the highway was blocked in time to apply his brakes and stop his car before the collision occurred. See Smith v. Swann, 73 Ga. App. 144, 35 S. E. (2d) 787 (4) and Fuller v. Steyermann, 46 Ga. App. 830, 169 S. E. 508.

The case was clearly one for the jury, as held by the Court of Appeals, and defendant's motion for judgment notwithstanding the verdict is therefore denied. See: Mann v. Central of Georgia Ry. Co., 43 Ga. App. 708, 160 S. E. 131; Rape v. Florida, Alabama and Georgia Ry. 47 Ga. App. 96, 169 S. E. 764; Central of Georgia Ry. Co. v. Mann, 48 Ga. App. 688, 173 S. E. 180; Courson v. A. B. & C.

BLEED THROUGH POOR COPY

Ry. Co., 70 Ga. App. 318; 28 S. E. (2d) 313; Shelly v. Pollard 55 Ga. App. 88, 189 S. E. 570; Central of Georgia Ry. Co. v. Heard 36 Ga. App. 332, 136 S. E. 533; Gay v. Smith 51 Ga. App. 615, 181 S. E. 129; Southern Ry. Co. v. Lowry, 59 Ga. App. 109, 200 S. E. 553, and Southern Ry. Co. v. Riley 57 Ga. App. 26, 194 S. E. 422; Texas-New Mexico Ry. Co. v. Bailey, et al., 203 Fed(2) 647; U. S. v. Fleming, 115 Fed(2d) 314; Seaboard Ry. Co. v. Deese, 185 Fed(2d) 290; Watson v. Southern Bus Lines 186 Fed(2d) 981; A. C. L. R. R. Co. v. Soffer, 184 Fed(2d) 842; A. C. L. R. R. Co. v. Key, 196 Fed(2d) 64 (7); A. C. L. R. R. Co. v. Freeman, 193 Fed(2d) 217 (5); Southern Ry. Co. v. Harris, 123 Fed(2d) 7; Stanaland v. A. C. L. R. R. Co., 192 Fed(2d) 432.

Ground 1 of the amended motion for a new trial contends that the Court erred in refusing to declare a mistrial upon the ground that counsel for the plaintiff in his opening statement to the jury did not confine himself to an outline of relevant facts which he intended to prove but fully argued the case before any evidence was introduced. There is no merit in this contention. Furthermore, the Court took extraordinary pains upon the second trial to admonish the jury that they were not to consider any remarks made by counsel for either side which did not bear directly on the issues made by the pleadings and the evidence. See Hunter v. U. S., 264 Fed 831; Robelio v. U. S., 291 Fed 975 (20); U. S. v. Delaney, 8 Fed. Supp. 224; Smith v. State 204 Ga. 184, 188, 48 S. E. (2d) 860 (2); J. W. Starr & Sons Lumber Co. v. York, 89 Ga. App. 22, 29, 78 S. E. (2d) 429, 434.

Ground 2 of the amended motion contends that an aerial photograph of the crossing taken approximately one year and nine months after the accident should not have been admitted in evidence. The evidence was undisputed that there had been no change in the physical conditions at and surrounding the crossing between the time of the accident and the time the picture was taken. See B. of Ev., pages

61, 495 et seq., 86 et seq. It was therefore clearly admissible in evidence. See Sylvania Central Ry. Co. v. Gay, 82 Ga. App. 486, 488 (2); 61 S. E. (2d) 587, which is squarely in point.

Ground 3 contends that the Court erred in admitting in evidence testimony as to the condition of the crossing where the accident complained of occurred on an occasion about one month after the accident under conditions different from those existing at the time of the accident. The undisputed evidence was that the weather conditions and phase of the moon were substantially identical on both occasions and the evidence was therefore clearly admissible. See B. of Ev., pages 117 et seq., 188 et seq.

Ground 4 contends that the Court erred in allowing counsel for plaintiff to cross-examine his own witness Lyons as to matters about which counsel had not claimed he had been entrapped by the witness. There is no merit in this contention, as shown by the record. Furthermore, under the Rules counsel has the right to ask a hostile and unwilling witness leading questions without pleading entrapment. Rule 43 (b).

Ground 5 complains that the Court erred in permitting the plaintiff to call witness G. H. Martin for cross-examination. This witness was the conductor in charge of the train when the accident occurred. At the hearing on the motion for new trial counsel cited for the first time the case of Dowell, Inc., v. Jowers, 182 Fed(2d) 576, in which it was held that it was error for the Court to permit the plaintiff to call an employee of the defendant for cross-examination, but that the error was harmless and did not affect the substantial rights of the parties. If error at all, it was clearly harmless error not affecting the substantial rights of the parties to permit the train conductor to be called for cross-examination. He could have been called as plaintiff's own witness and asked leading questions as a hostile and unwilling witness under Rule 43 (b), which would have amounted to the same thing for all practical

BLEED THROUGH POOR COPY

purposes. Plaintiff had already made out a prima facie case sufficient to shift the burden of offering proof to the defendant under Georgia law (Ga. Code Sec. 94-1108). The witness was examined by the defendant on direct examination following plaintiff's cross-examination and was cross-examined as to the matters brought out by plaintiff's counsel. In the Court's opinion the substantial rights of the parties were in no way affected by permitting the cross-examination of the witness to precede the direct examination even though this procedure may have been technically incorrect under the rules, contrary to the Court's opinion.

Grounds 6, 11 and 14 may be considered together. Section 94-505 of the Code of Georgia requires every railroad company to equip and maintain each locomotive used by such company on all portions of the railway line not used "solely as yards, spurs and side tracks" after dark with a good and sufficient headlight which shall consume not less than 300 watts at the arc and with a reflector not less than 23" in diameter and to keep the same in good condition. This means, of course, that the headlight must be turned on after dark and that it must be of sufficient strength to consume the required wattage. Ga. Ry. & Power Co. v. Belote 20 Ga. App. 454, 93 S. E. 62; Cosper v. A. C. L. 85 Ga. App. 683, 686, 69 S. E. (2d) 886; Mann v. Central of Ga. Ry. Co., 43 Ga. App. 708, 160 S. E. 131. The undisputed testimony, as well as the maps and photographs introduced in evidence, showed that this was an East-West cross-town track crossing some 10 or 12 parallel city streets and connecting the main line track of the defendant railroad company with the main line track of the Southern Railway Company. It forms part of a large "Y" on the west side which was used for reversing the direction of trains and in addition the track was frequently used for making all kinds of cross-town movements of trains. This was the testimony of defendant's own witnesses, both upon the first trial and upon this trial. B. of Ev., pages ..., 301, 302. There is no basis whatever under the evidence for the contention that no headlight was required on the engine

after dark because the railway line in question was used "solely as yards, spurs and side tracks".

Grounds 7 and 10 may be considered together. They complain that the Court erred in refusing to declare a mistrial on the ground that counsel for the plaintiff continued to refer to blinker lights at Pyles Marsh (another crossing in Glynn County) and to another accident there, after the Court had ruled out any testimony as to same. There is no merit in these grounds of the motion. The Court has no recollection of any continuous reference by counsel to the Pyles Marsh crossing or other crossings, and in addition the Jury was expressly admonished by the Court to disregard any reference to any crossing or crossing accidents other than the one involved in the case at bar. See cases cited elsewhere in this opinion on question of Court's discretion with reference to granting a mistrial because of remarks by counsel. See also A. C. L. v. Hadlock, 180 Fed (2d) 105 (4) (5th Cir.).

Ground 8 complains that the Court erred in admitting in evidence plaintiff's Exhibit No. 32 and testimony by the witness Gardner with reference thereto. There is no merit in this contention. This was rebuttal evidence introduced to impeach one of defendant's witnesses who attempted to estimate the speed of deceased's car solely by its appearance after the accident. It was clearly admissible for this purpose for whatever weight the jury might wish to give it.

Ground 9 complains that the Court erred in refusing to declare a mistrial upon the ground that plaintiff propounded questions to various witnesses which were allegedly "immaterial, irrelevant, inflammatory and prejudicial" and then withdrew the questions on objections made by the defendant before any ruling by the Court. There is clearly no merit in this contention since there was never any ruling by the Court as to whether or not the questions were immaterial, etc., as contended by defendant. It was clearly the right of counsel to withdraw the questions objected to before a ruling by the Court and certainly the mere asking

BLEED THROUGH POOR COPY

of an immaterial question cannot constitute grounds for a mistrial. In addition the jury was admonished by the Court to disregard any and all such questions as well as any and all evidence ruled inadmissible by the Court. On the question of the discretion vested in trial judges under Georgia law in the matter of declaring mistrials because of remarks made by counsel, see Smith v. State, 204 Ga. 184, 188, 48 S. E. (2d) 860; J. W. Starr & Sons Lumber Co. v. York, 89 Ga. App. 22, 29; 78 S. E. (2d) 429, 434 and the Federal cases cited above.

Ground 12 complains that the Court erred in charging the Jury that the defendant has the duty of exercising ordinary diligence to avoid doing injuries to persons or property which may be lawfully upon its public grade crossings in cities, towns or villages.

This charge was complained of in the first trial and was not held to be error by the Court of Appeals. The charge is in the language of the decision in the case of Driskell v. Powell, 67 Fed (2d) 484 (3) (5th Circ.) in which it was held that "the railroad, while it has the crossing obstructed, should use reasonable care that the obstruction does not injure travelers upon the street". See also: S. A. L. Ry. Co. v. Benton 43 Ga. App. 495 (3), 497, 159 S. E. 717, 719; Mann v. Central of Ga. 43 Ga. App. 708, 711, 160 S. E. 131; A. C. L. v. Freeman, 193 Fed (2d) 217 (3), A. C. L. v. Pidd 197 Fed. (2d) 153 (1). In the case at bar the conductor admitted that he knew this was a very dark crossing and he knew that the moon was casting shadows of a large oak tree on the equipment. B. of Ev., 272 et seq. He admitted that he had lanterns at hand to be used for protecting dangerous crossings when they were blocked. (B. of Ev., pages 291; 297 et seq.) He admitted that he had fuses which were sometimes used for giving warning to travelers on the street of a blocked crossing. (B. of Ev., page 259.) He admitted that if the headlight had been turned on it would have given some warning of the existence of the obstruction, and the only reason that it

was not turned on was for the convenience of the engineer. (B. of Ev., page 275; 299.) The jury was certainly authorized to find under this evidence that the crew knew that because of the unusual circumstances existing some extra warning, other than the unlighted train itself, should have been taken to warn travelers on the street that it was blocked. The facts in this case are quite similar to those in the case of Texas-New Mexico Ry. Co. v. Bailey, et al., 203 Fed (2d) 647, in which the Court of Appeals for the 5th Circuit upheld a verdict for the plaintiff. If anything, the facts in the case at bar are stronger for the plaintiff than they were in the case cited. See also the case of Atlantic R. R. Co. v. Dickson, 70 Ga. App. 590, 28 S. E. (2d) 879 (2), the case of A. C. L. v. Key, 196 Fed (2d) 64 (2), the Mann case cited above, and several of the others cited, in the first of which it was held that "the rights, obligations and duties of the railroad and travelers at public crossings are mutual and reciprocal."

Ground 13 complains that the Court erred in refusing to charge the Jury that in the absence of any evidence to the contrary, it may be reasonably presumed that the deceased was familiar with the crossing. The Court knows of no authority for such a proposition of law, and none has been cited to him. The complaint alleged that deceased was unfamiliar with the crossing and there was evidence from which the jury was authorized to find that deceased, who was driving a borrowed car, was not familiar with the crossing, which was located two miles or more from his home and which was not on the route traveled by him on his way to work.

This Court having heard the evidence in this case on two trials and having carefully observed the witnesses, considered their testimony, their manner of testifying and their demeanor on the stand, and having carefully studied the pictures, maps and other exhibits tendered in evidence, is of the opinion that the Jury was authorized to find that plaintiff's 24-year-old son was killed as the result of the

BLEED THROUGH POOR COPY

wanton negligence of the defendant, its servants, agents and employees. The verdict rendered in the case on both trials was for a modest sum compared to what the jury would have been authorized to find under the law of Georgia considering the age, earning capacity and future prospects of the deceased as shown by the undisputed evidence. This Court is of the opinion that the verdict was fair and just under the facts of this case.

The motion for judgment notwithstanding the verdict and the motion for new trial are hereby overruled and denied on each and every ground thereof.

This January 6, 1954.

(S.) F. M. SCARLETT,
Judge United States District Court, Southern District of of Georgia.

APPENDIX B

Opinion of the Court of Appeals

Filed January 7, 1955

Before HUTCHESON, Chief Judge, and HOLMES and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge: This is the second appearance of this case before us on appeal. The prior judgment was reversed because of the error of the court below in refusing to give certain instructions requested on behalf of the defendant. 205 F. (2) 525. We adhere to our ruling on the former appeal that this is not a case for punitive damages, and that the real question as to liability is one of comparative negligence. We also adhere to what was said in our former opinion about the impropriety of allowing an opening statement by counsel to be converted into a lengthy argument on the merits of the case, which tends to create such an atmosphere of bias or prejudice in the court

room as to render it difficult for the jury to listen to the evidence with an open mind.

This action was instituted under the wrongful death statute of Georgia; it involves a grade crossing accident, occurring about 1:30 A.M. in Brunswick, Georgia, which resulted in the death of appellee's son, who drove his automobile into the side of a train that was occupying the crossing on a clear night, with the moon, almost ready to set, shining through the large oak trees. In his opening statement to the jury, the plaintiff's attorney did not confine himself to a simple statement of the issues presented by the pleadings, or to the facts that he intended to prove by the witnesses, but he went further and made an inflammatory speech to the jury upon the merits of the case, discussing both the law and the facts in strong language and stating facts that would be clearly inadmissible in evidence. This purported opening statement began on page 132 and ended on page 169 of the printed record. The opening statement on behalf of the defendant covered almost exactly 3 pages.

It would be hard to overstate the prejudicial effect of this method of trying a lawsuit. There was no surviving eye witness to this terrible accident. The deceased was traveling alone, and there were no cars behind him. There were five members of the train crew: conductor, fireman, engineer, and two flagmen; but none of these saw the automobile before the accident, except the fireman testified that he got a glimpse of it just before the crash.

After the jurors were accepted, sworn, and impaneled, to sit as impartial triers of the facts, they were required to listen to a lengthy speech upon the alleged law and the facts of the case, the former not given them by the court and the latter not testified to by any witness. The plaintiff's attorney read from Georgia statutes as to the full value of a child's life that had been snuffed out by the inexcusable negligence of the defendant. The point he allegedly wished to bring to the jury's attention was that

BLEED THROUGH POOR COPY

a penalty was imposed upon a person who caused the death of another by negligence. He said: "The penalty goes to the person who is authorized to sue for the negligent homicide. It is penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause of action is vested."

Then followed an argument between counsel, interspersed with interrogatories by the court, as to whether the plaintiff was suing under the old law or the new one. The plaintiff's attorney said there was a question in his mind whether it was the same law or not. He did not want the court to rule on it now; it might not come up. Finally, the plaintiff's attorney said: "If your Honor please, I am trying to tell this jury that we are going to prove to them beyond any peradventure of doubt that this young man was killed by the most inexcusable negligence that they have ever experienced in the Court House. We are going to prove that." This statement was objected to as highly argumentative and prejudicial, and the objection was overruled. The court also refused to declare a mistrial, as requested by the defendant. The attorney for the plaintiff then continued as follows:

> "As I was about to say to you, gentlemen, we expect to show to you by overwhelming evidence in this case that this young man was 24 years old, just a young man, and was living with his *invalid* father . . . that he was one of the most promising and finest young men in the City of Brunswick . . . that the life of that young man was snuffed out in the twinkling of an eye . . . Now, Mr. Conyers has already started to objecting . . . , I have no prejudice or bias against the railroad. I have been counsel for the Southern Railroad myself."

The court sustained the objection to the above, and plaintiff's attorney said: "If he is not going to let me say anything, suppose I just read the plaintiff's petition." But

he did not do that. He said: "All right, your Honor. I don't want anything in this record this time. I want to do anything and everything Mr. Conyers wants me to do. You will see that map later, Gentlemen. Anyway, gentlemen of the jury, this young man was driving his friend's automobile that morning to pick up his sweetheart, who worked in a restaurant in Arco, and who got off at 2 o'clock." Then he went on to tell that young Kammerer was very much in love with her and would go out every morning to take her home, going into unnecessary details, stating matters not admissible in evidence. Sometimes he appeared to be testifying as to facts within his own knowledge; and, when objection was made, sometimes the court would sustain the objection, but generally it would hold that if he was going to introduce evidence to prove the facts stated, he could tell it in his opening statement. Then would follow a torrent of words, which cover pages in the record, about this fine young man who was "absolutely sober on this occasion" and who "drove that car just as straight as he could go between the front of the engine and a box car that was hitched on to the front of the engine."

"In other words," he said, "the railroad had parked this engine with a box car in front of it in line of his vision, and the boy without ever putting on any brakes . . . drove that car just as straight as a martin to his goal right into what we will contend was a death trip." The attorney told the jury in no uncertain terms whether or not this young man was sober, saying: "Now, he was absolutely sober on this occasion." Then followed several pages of argument upon the negligence of the railroad and its employees, winding up with a plea to the jury to give this case the most careful consideration, because "the only reason they give us is that this boy was running too fast." The opening statement was about one-third over at this time, and counsel seemed to shift his role from attorney to witness. He said:

BLEED THROUGH POOR COPY

"Mr. Kammerer and I went out to the same place 29 nights later when the almanac showed that the moon was exactly in the same phase it was the night this boy was killed. He [we] went out there to see just what the situation was. We knew there had to be something very unusual out there, or the boy would have put on his brakes at the last minute. Something was wrong because he never saw that train. There were no skid marks of any kind. He just went right straight into that train. We took a group of men, two policemen any [and] two or three other men out there to see what was the trouble and we found it.

"Now, the railroad, the conductor and the engineer admit that they knew that thing existed out there but did not take any kind of precaution that would protect the public against it.

"Now, here is what happened, what the situation was; that crossing, as the pictures will show you, is completely overhung with a low hanging oak tree branches that came right down to the height of a box car—came right down to the height of the box car. It was dark out there. It was almost a forest you might call it. This track comes out of a sort-of a jungle on to this street, and this engine was sticking out about three feet over on the paved part of Albany street. The old oak tree over-hangs it there. It over-hangs the only old sign there. They do not pretend to have a regular crossing sign. They just have one of these old basket ball washed out signs. They don't pretend to have a regular legal crossing sign, although it is the law of Georgia to have it."

All this arguing and witnessing continued until another objection was raised and the court had not heard exactly what was said by the plaintiff's attorney. No wonder the court "didn't catch just exactly what was said"; but we cannot presume that the jurors failed to catch it. The attorney then began to read the pleadings, which are of a

character that Stephen on Pleading calls an endless wrangle on the record. He would read a while and talk a while, interspersing any argument that occurred to him. With an air of patience and generosity, he brushed aside all objections of opposing counsel, all the mild admonitions of the court, and continued in the same tenor to the end of his opening statement. After a brief statement of what he expected to prove, the attorney for the defendant renewed his motion for a mistrial, which the court overruled, saying: "I admonished the jury not to consider anything counsel said unless it was what he intended to prove by relevant and competent evidence." At this point the proceedings were adjourned, and the jury excused, until 10 o'clock the next morning, not a line of evidence having been introduced but the minds of the jurors having been filled with unsifted facts as to the alleged negligent death of this man.

In *Maryland Casualty Co. v. Reid*, 76 F. (2) 30, 33, Judge Hutcheson says that it is the duty of a judge not to let the trial of a lawsuit get out of bounds, and that is exactly what happened in this case. Too much of the trial took place out of bounds. If an objection was made to one of his questions, the attorney for the plaintiff would often withdraw it; but the damage was done by merely asking the question. It would be unreasonable to expect the jurors to remember the court's instructions to disregard all the things said by the plaintiff's attorney that the court had told them to disregard. In his closing argument, the attorney said to the jury: "I don't know how many boys have been killed or injured as a result of the operation of this railroad in and around Brunswick. I know of three that were killed in one car." Objection was made and motion for a mistrial made; but the court overruled the motion after instructing the jury to disregard any other accidents that might have happened in connection with this railroad. (See Appendix.)

The same attorney also repeatedly asked the jury to bring in a verdict that would shock the defendant into do-

BLEED THROUGH POOR COPY

ing something about this operation, sometimes referring to it as this arrogant railroad company. This was both before and after he told the jury of three boys being killed in one car, "besides this one."

Too many errors infect this verdict for it to be permitted to stand. The judgment appealed from is reversed, and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED.

Appendix

The following is from the argument to the jury in the closing speech on behalf of the plaintiff, pages 660 and 661 of Vol. 2 of the Record:

"Argument on behalf of the Plaintiff.

"By Mr. E. Way Highsmith:

"May it please the Court, and you gentlemen of the jury: I don't know whether you gentlemen read the same Bible rules or not, but I want to quote you one: 'Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the Prophets.'

"I read that this morning to my wife and three boys. I said, 'Well, I am going to take that as my text this morning before that jury.' I am going to do my best to point out to you gentlemen by simple reasoning that this railroad company not only doesn't adopt one fragment of that teaching of the lowly Nazarene, but on the contrary it seems to have a rule of conduct in its operation of its railroad in Brunswick that is directly and diametrically opposed to it, and that in my weak and humble way I am going to try to get this jury to bring in a verdict in this case that will help the people of Brunswick in some degree by making this

arrogant railroad company adopt the Golden Rule in its operation of its railroad. Some of you gentlemen are from Brunswick and some of you are not, but I don't know how many boys have been killed or injured, as a result of the operation of this railroad in and around Brunswick. I know of three that were killed in one car, besides this one."

"Mr. Conyers:

"Now, may it please the Court, I object to that statement and move for a mistrial on the basis of the statement that Mr. Highsmith has just made with reference to other deaths in Glynn County on account of the operations of the defendant's trains.

"The Court:

"Gentlemen of the jury, of course any other accident that might have happened in connection with the Atlantic Coast Line Railroad Company would not be admissible in this case. So, you gentlemen confine yourself to the evidence in this case, and don't consider any statement counsel made about that.

"Mr. Conyers:

"Does the Court overrule the motion?

"The Court:

"With that admonition I overrule your motion.

"Mr. Conyers:

"I except to Your Honor's ruling.

"The Court:

"All right."

BLEED THROUGH POOR COPY

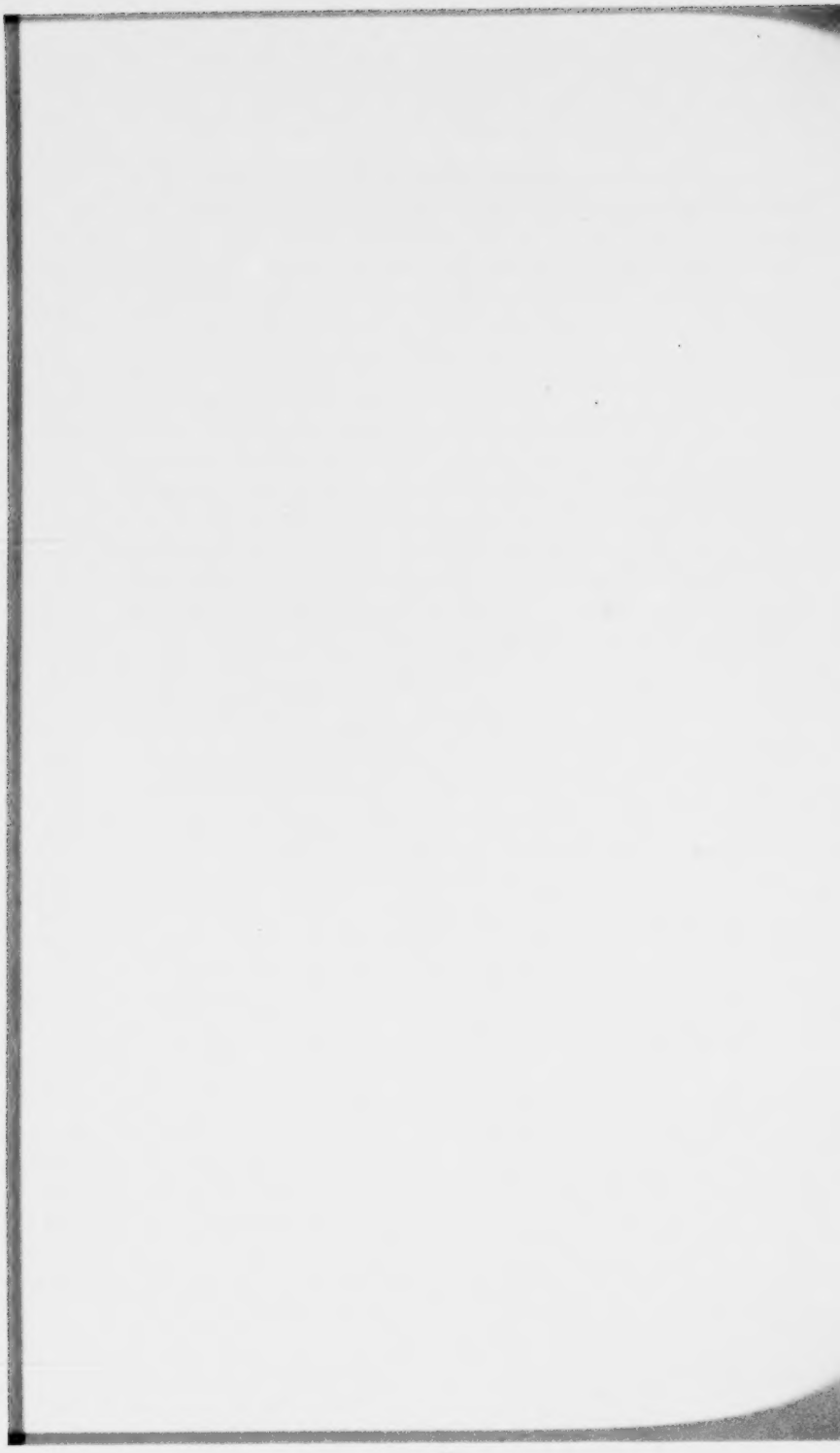
APPENDIX C

JUDGMENT OF COURT OF APPEALS, January 7, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Albert Gregor Kammerer, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.



BLEED THROUGH POOR COPY

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 683

ALBERT GREGOR KAMMERER, *Petitioner,*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, *Respondent.*

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Petitioner contends that this case merits review because the Court of Appeals invaded the sphere of the trial judge and the jury in violation of the decisions of this Court and other Circuits. Respondent's Brief in Opposition by its omissions emphasizes that review is appropriate here.

The brief nowhere challenges or even discusses the cases cited in the petition which established that the Court of Appeals decision was contrary to the decisions of this Court. It quarrels with the verdict of the jury *on the merits.* But the brief, signed by trial counsel, does not deny that the trial judge maintained complete control over proceedings in his court, despite the contrary view set forth in the Court of Appeals opinion.

The brief in opposition consists almost entirely of:

(1) A statement of the *facts* which attempts to show that the accident was the fault of petitioner's son, although this issue was twice determined to the contrary by the jury (pp. 2-7);

(2) A lengthy argument that, *under Georgia* law, both the trial court and the Court of Appeals erred in failing to grant defendant's request for judgment n.o.v. on the ground that the death of petitioner's son was due to his own negligence (pp. 7-13);

(3) A quotation in extenso from a decision on improper argument by this Court, which is beside the point because that case turned on the failure of the trial judge to take corrective action (pp. 14-17). In the present case the trial court took special pains to correct any allegedly improper effect of counsel's arguments (see Petition pp. 5-7); and

(4) A complaint that, although the trial judge properly instructed the jury to disregard statements outside the record, it did not rebuke counsel who made the statement (pp. 17-19).

In sum, the brief in opposition represents merely a quarrel with the jury's verdict and with decisions on the applicable principles of Georgia law as applied by both lower courts. That brief thus establishes that the issue was a matter for the jury, and that the Court of Appeals erred in setting the verdict for counsel's argument, in violation of the rules laid down by this Court and by other Circuits.

WHEREFORE, the petition should be granted and the judgment reversed with directions to reinstate the verdict of the jury.

THURMAN ARNOLD,
E. WAY HIGHSMITH,
Attorneys for Petitioner.

BLEED THROUGH POOR COPY

E COPY

Office - Supreme Court, U. S.
FILED
APR 16 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 683.

ALBERT GREGOR KAMMERER,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY IN OPPOSITION.

CHARLES L. GOWEN,
CHRIS B. CONYERS,
Attorneys at Law for the Respondent,
National Bank of Brunswick Building,
Brunswick, Georgia.

BLEED THROUGH POOR COPY

INDEX.

	PAGE
OPINIONS	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	7
CONCLUSION	19

CASES CITED.

	PAGE
A. C. L. v. *Marshall,* 89 Ga. App. 740 (81 S. E. 2d 228)	6, 11
Atlantic Coast Line Ry. Co. v. *Kammerer,* and *vice versa,* 205 F. 2d 525	6
Baker v. *A. C. L.,* 52 Ga. App. 624 (184 S. E. 381)	6, 10
Bassett v. *Calloway,* 72 Ga. App. 97 (33 S. E. 2nd 112)	6, 10
Burnett vs. *Louisville and Nashville Bar Company,* 197 S. E. 663, 58 Ga. Appeals 64	9
Evans vs. *Georgia Northern Railroad Company,* 52 S. E. 2nd	12
Froberg vs. *C. I. & L. Railway,* 93 Federal 2nd, 259	12
Georgia Power Company v. *Maxwell,* 52 Ga. App. 430 (183 S. E. 654)	6
Good vs. *A. C. L. Railroad Company,* 142 Federal 2nd	12
Kroger Grocery & Baking Co. v. *Stewart,* 164 F. 2d 841, 844	17
L. & N. Railroad Company vs. *Outlaw, et al.,* 67 2nd, 367	12
London Guarantee & Accident Co. vs. *Woelfe,* 83 F. 2d 325, 342	13
Missouri K-T R. Co. v. *Ridgway,* 191 F. 2d 363, 369	18
Nations vs. *United States* (C. C. A. 8) 32 F. 2d, 598	13
New York Central R. R. Co. v. *Johnson,* 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706	14, 18
New York Life Ins. Co. v. *Doerksen* (C. A. A. 10), 75 F. 2d, 96, 102	13
Pollard v. *Clifton,* 62 Ga. App. 573 (9 S. E. 2nd 782)	6, 9
Southern Ry. Co. v. *United States,* 197 F. 2d 922	6
Union Pacific R. Co. v. *Field,* 8 Cir., 137 F. 14, 15	18
Viereck v. *U. S.,* 318 U. S. 236, 247, 87 L. Ed. 734, 741	18

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 683.

ALBERT GREGOR KAMMERER,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY IN OPPOSITION.

Opinions.

The opinion of the United States District Court on the motion for new trial (R. 29-39) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 218 F. 2d 149. The opinion of the United States Court of Appeals for the Fifth Circuit on the first appeal is reported at 205 F. 2d 525.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 7, 1955. There was no motion for rehearing. The petition for writ of certiorari was filed March 29, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

Whether the decision of the Court of Appeals that too many errors infected the verdict upon which judgment was rendered in this case in the District Court to permit it to stand is correct.

Statement.

Petitioner filed his petition in the United States District Court for the Southern District of Georgia, Brunswick Division, to recover damages from respondent for the alleged tortious killing of petitioner's son, Albert Gregor Kammerer, Jr., as a result of a collision between an automobile driven by petitioner's son and a train owned and operated by respondent in the City of Brunswick, Georgia. Upon trial the jury returned a verdict in favor of petitioner and against respondent and judgment was entered accordingly thereon by the District Court.

Respondent timely filed its motion for judgment notwithstanding the verdict, or in the alternative motion for a new trial, which motion was overruled by the District Court. In due course respondent filed its notice of appeal from the judgment rendered and the Court of Appeals reversed this judgment.

The evidence disclosed that the accident complained of occurred at approximately 1:30 A. M. at the intersection of Albany and Q Streets in the City of Brunswick where a spur track of respondent's railroad crosses Albany Street. Albany Street runs in generally a north and south direction and the spur track crosses at an angle of roughly east northeast to west southwest. The deceased (petitioner's son) was driving his automobile on Albany Street in a

BLEED THROUGH POOR COPY

northerly direction and ran into the side of respondent's train, which consisted of an engine and one freight car coupled ahead of the engine. Respondent's employees in charge of the train had, just prior to the accident, been operating a train consisting of approximately 50 cars on respondent's main line which parallels Albany Street and lies two blocks to the east. Being in need of another empty freight car for the night's operation, the engine and one car were cut off the main unit and proceeded up the spur track to pick up a car which had previously been spotted for unloading on the spur track approximately fifteen feet west of Albany Street. When approaching Albany Street from the east, the conductor was stationed on the lead end of the freight car with a lantern. Before entering Albany Street, the unit was brought practically to a stop while the conductor looked to see if any automobile was approaching. The conductor had a clear view to the south (the direction from which the deceased approached) of at least one-half mile, the street being straight and level. Seeing no traffic approaching, the conductor gave the go ahead signal and the unit proceeded across Albany Street and coupled to the freight car there spotted. The unit came to a stop blocking Albany Street with the engine projected some five to six feet on the pavement from the east and the freight car ahead across the remaining portion of the street. The conductor immediately walked to the center of the car next ahead to ascertain whether or not it was empty. Upon opening the door, he heard a crash as petitioner's son ran into the side of the train.

The night was clear and dry. The moon was setting. The only evidence which would in any manner have indicated any unusual conditions existing at the time of the collision which could have affected the vision of petitioner's son or could have prevented him from seeing the train

standing on the crossing was testimony of witnesses of the petitioner that the moon shining through trees cast shadows over the crossing.

The evidence was uncontradicted that petitioner's son was exceeding the speed limit of the City of Brunswick at the time of the collision. The witness, Anderson, estimated the speed of the automobile at 50-75 miles per hour (Record, p. 501). Officer Woodham gave as his estimate of the speed of the automobile approximately 50 miles per hour (Record, p. 462). The witness, Drummond, testified the car was going too fast to estimate the speed (Record, p. 551).

The evidence disclosed that in the City of Brunswick there are only three paved streets running in a northerly and southerly direction which could be used by any person leaving the City of Brunswick in the direction in which the deceased was driving. The particular spur track, on which the collision complained of occurred, crosses all three of these paved streets (Record, p. 246). The deceased had been a resident of the City of Brunswick all of his life with the exception of approximately four years during which time he was in the armed forces and at college (Record, p. 245).

The photographic exhibits introduced in evidence clearly show that the crossing where the accident complained of occurred was well marked with crossing signs. Although these signs were not as a matter of fact the "X signs" as required by rules of the Georgia Public Service Commission, they were approximately four feet square in dimensions with large letters painted thereon indicating "Railroad Crossing, Unsafe Crossing". These signs were maintained in compliance with Sec. 95:1801 *et seq.* of the Code of Georgia which prescribes regulations for Unsafe Crossings as designated by the governing county authorities.

BLEED THROUGH POOR COPY

It was admitted by employees of the respondent that the front headlight of the engine (which was adjacent to a box car) was not burning at the time of the collision, however, the rear headlight of the engine ~~was~~ pointed in the direction in which the train was next to have moved was burning. The front headlight of the engine was not burning because with it on adjacent to the box car the engineer could not have seen the signals given by the conductor ahead upon which he depended for movement of the train. It was admitted further by employees of the respondent that no flares were burning at the crossing and that no warning lights were set out by any member of the crew.

The only evidence introduced by petitioner to establish any unusual condition which would have prevented the deceased from observing respondent's train upon the crossing (other than the testimony of the witness, Miller) was the testimony of various witnesses who visited the scene of the collision approximately one month thereafter and testified as to shadows being cast upon the crossing. These witnesses testified that it was difficult to observe a box car of respondent which was parked some fifteen feet west of Albany Street on the night of the experiment conducted approximately one month after the date of the collision. Upon the present trial, petitioner's witness, Deaver, (a member of the police force of the City of Brunswick) testified that the experiments conducted were made driving up and down Albany Street, but as soon as the automobile was turned toward the box car parked west of Albany Street it was clearly visible (Record, p. 287). This witness testified further that upon the night of the experiment had there been a railroad box car parked upon the crossing over Albany Street, he would have observed the same had he been driving at a legal rate of speed and exercising ordinary care for his own safety (Record, p. 286). This witness

testified further that the shadows observed by him on this particular night were not such an obstruction to vision which would not have been dispersed by properly working headlights of an automobile (Record, p. 287).

We respectfully submit that there was no evidence introduced in behalf of petitioner as to any unusual conditions existing at the time of the collision which would take this case out of the rule established by the appellate courts of Georgia in the cases of *Pollard* v. *Clifton*, 62 Ga. App. 573 (9 S. E. 2nd 782); *Bassett* v. *Calloway*, 72 Ga. App. 97 (33 S. E. 2nd 112); *Baker* v. *A. C. L.*, 52 Ga. App. 624 (184 S. E. 381); and *A. C. L.* v. *Marshall*, 89 Ga. App. 740 (81 S. E. 2d 228). Petitioner's own witness (Deaver) testified that the shadows across the crossing were not such which would not have been dispersed by properly working headlights.

The bell on respondent's engine was ringing and the engine was standing on Albany Street directly in the path of the deceased's car. Certainly this was sufficient warning of itself of the presence of the train on the crossing to any motorist proceeding with due caution for his own safety.

The Court of Appeals held "the real question as to liability is one of comparative negligence" and questions of comparative negligence and the duty on the deceased to exercise ordinary care to avoid the consequences to himself of any negligence of respondent are matters to be weighed by the jury. *Georgia Power Company* v. *Maxwell*, 52 Ga. App. 430 (183 S. E. 654); *Southern Ry. Co.* v. *United States*, 197 F. 2d 922.

At the first appearance of this case before the Court of Appeals,[1] in an effort to prevent a second reversal because of "out of bounds" conduct of plaintiff's counsel, the court

---

[1] *Atlantic Coast Line Ry. Co.* v. *Kammerer*, and *vice versa*, 205 F. 2d 525.

BLEED THROUGH POOR COPY

went to considerable pains to put counsel on notice that an opening statement in which he argued the case fully, "claiming that only a railroad company could escape prosecution for such wilful and wanton negligence", before any evidence was introduced, "tended to create such an atmosphere of bias or prejudice" as would constitute grounds for reversal.[1]

Instead of confining his opening statements to the facts to be proven by *relevant, competent, and material evidence,* plaintiff's counsel decided not to heed the warning of the Court of Appeals but instead made an opening statement that was filled with irrelevant, prejudicial, and incompetent statements. Petitioner's counsel evidently deliberately decided not to follow the law of the case as declared by the Court of Appeals evidently hoping that a second jury verdict, though infected with error, might be permitted to stand.

Argument.

Petitioner's brief in support of the petition for certiorari makes the contention that liability in the case at bar "was plain" and "was fully established", all of which is not supported by the evidence or the law.[2] The respondent argued in the Court of Appeals and believes now that the motion for judgment n.o.v. should have been sustained.

---

[1] The reason only plaintiff's counsel's opening statement was commented upon when this case was first before the Court of Appeals is explained by the fact that counsel's arguments to the jury were not included in that record.

[2] The trial judge held during the trial that it was a close case. He said in overruling the plaintiff's motion for a directed verdict: "I think if the jury believes your witnesses, they will find for the plaintiff. If they believe the defendant's witnesses, they will find for the defendant. I mean taking them as a whole. I think it is a disputed issue of fact to be determined by the jury" (Record, p. 605).

While the Court of Appeals did not agree with us, we respectfully submit that the proximate cause of the death of petitioner's son was his own negligence.

The Appellate Courts of Georgia have consistently held that when a motorist drives into the side of a train which is standing on, or moving over, a crossing his own negligence must be considered the proximate cause of the collision, thus barring a recovery against the railroad company unless some unusual circumstances existed at the time, such as fog, smoke, or other atmospheric conditions which would require the railroad to furnish some extra warning.

> "We think the Judge properly withdrew the case from the jury and directed the verdict. While ordinarily the question whether a plaintiff is barred from recovery by his own negligence is for the jury, this is one of those cases where such a conclusion should be reached as a matter of law. Without deciding whether the blocking of the crossing for longer than the time provided by the municipal ordinance could or could not have figured in the case if the allegation had been proved, the evidence failed to show that the ordinance had been violated. The evidence showed that the plaintiff was familiar with the crossing, though he stated he did not know about the incline, because he had not traveled the road at night. There was no evidence that it was misty or raining or why the view was obstructed or made difficult except the incline of the tracks. Irrespective of whether the railroad was negligent in failing to provide any or all of the safeguards as contended by the plaintiff the uncontradicted evidence including photographs of the scene showing the crossing, incline, dip in the road, etc. shows that the plaintiff could easily have seen the cars on the tracks if his automobile lights had been burning properly (and he swore they were) in ample time for him to have stopped his car. The night was

BLEED THROUGH POOR COPY

dark which rendered the cars more susceptible to vision and light reflections than would otherwise have been true."

Burnett vs. *Louisville and Nashville Bar Company,* 197 S. E. 663, 58 Ga. Appeals 64.

"The driver of an automobile who knows that he is approaching a railroad crossing in the night time and fails to reduce the speed of his car so that it may be stopped within the range of his lights when he discovers that a train of cars is stopped or passing over such crossing is guilty of such a lack of ordinary care as will prevent a recovery from the railroad."

Pollard, Receiver vs. *Clifton,* 9 S. E. 2nd 782, 62 Ga. Appeals, 573.

"Petitioner alleged that her deceased husband was driving on Fort Benning Boulevard and approached a crossing of the Central of Georgia at a point beyond Baker Village at approximately three o'clock A. M. in the morning while it was still dark. It is alleged that the defendant permitted a freight train to remain stationary with the freight cars thereof across Benning Boulevard and blocking same. Benning Boulevard was straight for a distance of one hundred yards from the crossing. The acts of negligence alleged against the defendant were as follows: (a) In placing a freight car across said Benning Boulevard at night while it was dark and allowing same to remain motionless across said highway; (b) In allowing its freight car to remain across said Benning Boulevard in the darkness of the night when it should have known that same would not be visible to motorists traveling from Columbus against the dark background on the Benning side of the highway; (c) In allowing said freight car to remain across said highway without having a flag-

man with a lighted lantern or other light in the highway on the Columbus side to warn motorists using said highway of the presence of said freight car; (d) In not having installed the said crossing with a warning signal light; (e) In not having installed the said crossing with a warning signal bell; (f) In not having installed near said crossing cross arms to be lowered across said highway when said crossing was in use by defendant."

The Court in affirming the judgment of the Superior Court of Muscogee County in sustaining a general demurrer to the petition said

> "The mere blocking of a public crossing at night is not negligence. As amended the petition shows that Colonel Bassett had a straight stretch of road between him and the railroad crossing for a distance of one hundred yards. In the absence of an allegation to the contrary it would be presumed that Colonel Bassett was familiar with the crossing. No reason was alleged why Colonel Bassett's lights would not have shone upon and revealed the presence of the freight car unless it was the fact that the lights reflected beneath the freight car. In which case the lights were in improper condition. It cannot be questioned that it is negligent to operate an automobile at night with lights which would only shine underneath a freight car and not upon some part of it from a distance of fifty feet. Therefore it appears from the petition that Colonel Bassett was negligent if he drove his car at such a speed that he was unable to stop within the distance of his lights at the time whether the lights at the time were required by law or in improper condition.
>
> *Bassett* vs. *Calloway,* 33 S. E. 2nd, 112; 72 Ga. Appeals, 97.

See also *Baker* vs. *Atlantic Coast Line Railroad Company,* 184 S. E. 381; 52 Ga. Appeals, 624.

BLEED THROUGH POOR COPY

See also *Atlantic Coast Line Railroad Company* vs. *Marshall,* 81 S. E. 2nd, 228, in which the Court of Appeals of Georgia held

"The Court erred in denying the motion for a new trial on the general grounds because the evidence did not authorize a finding that the defendant was negligent in any particular which contributed to the plaintiff's injuries. The mere act of stopping railroad cars on a crossing for such a length of time as might be reasonably necessary in conduct of the railroad's business would not constitute negligence on the part of the defendants. Other facts must be shown to place on a railroad and its employees the duty to give the traveling public warnings of the presence of the train on the crossing in addition to that which is given by the train itself. Mann *vs.* Central of Georgia Railroad Company, 43 Ga. Appeals, 708; 160 S. E. 131; and Gay *vs.* Smith, 51 Ga. Appeals, 615; 181 S. E. 129.

"In this case the only other fact relied on to impose the additional duty on the part of the defendants was the presence of fog, smoke and extreme darkness in the atmosphere. It is conceded by the defendant in error and correctly so that the factor of fog and smoke is necessary to establish liability in this case and the decisions are clear and numerous on this question. Georgia Northern Railroad Company *vs.* Stains, 88 Ga. Appeals, 6; 75 S. E. 2nd, 833; and Brinson *vs.* Davis, 32 Ga. Appeals, 37; 122 S. E. 643. Georgia Law requires headlights on motor vehicles operated on the public streets or highways which will illuminate 500 feet. Code of Ga. Section 68-316.

"In order to establish liability in this case it was necessary for plaintiff to prove by competent testimony that the fog and smoke impaired the driver's visibility to such an extent that he did not have clear vision for 500 feet otherwise the fog and smoke

> would not have been a material factor. The evidence in this case failed to show to what extent visibility of the driver was impaired which left the question of liability one of mere conjection. No witness testified as to the extent of the impairment of the driver's visibility either directly or by proof of circumstances from which a conclusion could legitimately be drawn."

The Courts of Georgia have extended this doctrine to refuse to allow a recovery by a guest in an automobile despite the fact that the negligence of the driver was not imputable to him. In *Evans* vs. *Georgia Northern Railroad Company,* 52 S. E. 2nd, page 58, 78 Ga. Appeals 709, the plaintiff alleged that he was riding in an automobile driven and under the exclusive control of his wife and belonging to his mother when he received certain injuries as a result of a collision with defendant's train. In affirming the judgment of the trial court sustaining the general demurrer to the petition the Court held

> "It clearly appears from the petition in the present case that the sole proximate cause of the collision was the failure of the operator of the automobile with full knowledge of the conditions then existing to exercise ordinary care and control the automobile so as to avoid striking the train that was actually proceeding across the intersection and the trial judge did not err in sustaining the general demurrer of the defendant and in dismissing the petition."

This line of decisions is followed in other jurisdictions, see *Good* vs. *A. C. L. Railroad Company,* 142 Federal 2nd, page 46; *Froberg* vs. *C. I. & L. Railway,* 93 Federal 2nd, 259; *L. & N. Railroad Company* vs. *Outlaw, et al.,* 67 2nd, 367.

BLEED THROUGH POOR COPY

These authorities clearly show that under any view this was a close case with ample evidence to support a verdict for the defendant if the jury returns one.

This was a case where improper argument, the introduction of irrelevant and incompetent matter, and the practice of asking improper questions would be expected to affect the result.[1]

Petitioner's counsel went into the case in the face of the injunction from the Court of Appeals to see that irrelevant, immaterial, and prejudicial matters were eliminated. Instead of governing himself accordingly, he went resolutely and unheedingly along the path the Court of Appeals had warned against and became the author of his own misfortune against which he now so bitterly complains.

> "In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, applicable law, the pertinent evidence, and such legitimate inferences as may properly be drawn therefrom. Union Electric Light & Power Co. *vs.* Snyder Estate Co. (C. C. A. 8), 65 F. 2d 297, 302."
>
> *London Guarantee & Accident Co.* vs. *Woelfe*, 83 F. 2d 325, 342.

In *Nations* vs. *United States* (C. C. A. 8) 32 F. 2d, 598, it was held that the prejudicial and improper remarks there complained of were not cured by the mere sustaining of objections by the court; and to the same effect is *New York Life Ins. Co.* v. *Doerksen* (C. A. A. 10), 75 F. 2d, 96, 102.

---

[1] The Court of Appeals recognized that the practice adopted by the plaintiff's counsel at the trials of asking questions which a 'distinguished member of the local bar' was bound to know were improper and then withdrawing them after objection is made was made damaging by the mere asking of the questions. Examples of this will be found at R-196-197; R-201; R-204; R-205; R-230; R-237; R-242; R-243; R-265; R-276; R-278; R-281; R-289-290; R-310; R-318; R-332; R-333; R-336; R-382; R-406; R-412-413.

This Court has itself reversed a verdict for damages for improper conduct of counsel in undertaking to set up an aura of prejudice against the defendant railroad company. As Mr. Justice Stone said in *New York Central R. Co.* v. *Johnson,* 279 U. S. 310; 48 S. Ct. 300; 73 L. Ed. 706:

> "Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. See Masterson *v.* Chicago & N. W. R. Co., 102 Wis. 571, 574, 78 N. W. 757, 6 Am. Neg. Rep. 245; Gulf, C. & S. F. R. Co. *v.* Butcher, 83 Tex. 309, 316; 18 S. W. 583; Tucker *v.* Henniker, *supra,* at 322 (41 N. H.); Monroe *v.* Chicago & A. R. Co., 297 Mo. 633, 644, 249 S. W. 644, 257 S. W. 469. The failure of the trial judge to sustain petitioner's objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. See Hall *v.* United States, 150 U. S. 76, 81, 37 L. ed. 1003, 1007, 14 Sup. Ct. Rep. 22; Graves *v.* United States, 150 U. S. 118, 121, 37 L. ed. 1021, 1023, 14 Sup. Ct. Rep. 40; Wilson *v.* United States, 149 U. S. 60, 68, 37 L. ed. 650, 652, 13 Sup. Ct. Rep. 765. That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal is, we think, not open to argument. The judgments must be reversed with instructions to grant a new trial.
>
> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy . . . of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and

BLEED THROUGH POOR COPY

impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See Union P. R. Co. *v.* Field, 69 C. C. A. 536, 137 Fed. 14, 15; Brown *v.* Swineford, 44 Wis. 282, 293, 28 Am. Rep. 562. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. Bransfield *v.* United States, 272 U. S. 448, 450, 71 L. ed. 345, 346, 47 Sup. Ct. Rep. 135.

"As there must be a new trial, attention should be directed to other objectionable conduct by respondents' counsel in the course of the trial; their repeated assertion, without supporting evidence, that the defense was a 'claim agent defense'; references to petitioner as an 'eastern railroad'; and statements that the railroad had 'come into this town,' and that witnesses and records had been 'sent on from New York,' for the trial of the cause. Such remarks of counsel, and others of similar character, all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country, have been so often condemned as an appeal to sectional or local prejudice as to require no comment. See Cherry Creek Nat. Bank *v.* Fidelity & C. Co. supra; Dolph *v.* Lake Shore & M. S. R. Co., 149 Mich. 278, 280, 112 N. W. 981; Southern R. Co. *v.* Simmons, 105 Va. 651, 665, 55 S. E. 459.

"These writs of certiorari were granted on a petition signed by counsel for petitioner who did not participate in the trial. It stated that the cases were of importance and were such a departure 'from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of

supervision.' But this argument here was so inadequately prepared and exhibited such lack of familiarity with the record as not to be of assistance to the court, and in the argument of counsel on both sides who had participated in the trial below there was a want of that candor which is essential to the proper and adequate presentation of a cause in this court. The occasion seems appropriate to remind counsel that the attempted presentation of cases without adequate preparation and with want of fairness and candor, discredits the bar and obstructs the administration of justice."

The attitude of other Circuit Courts toward the interjection of irrelevant personalities and appeals to prejudice or passion is the same as that of the Fifth Circuit:

> "With respect to the alleged misconduct of counsel for plaintiff in his argument to the jury, his insinuation that opposing counsel had 'tried everything except the facts' had nothing whatever to do with the merits of the controversy between the parties. The remark was improper and offensive and the refusal of the court to direct the jury to disregard it was error. The attitude of this Court and of other federal appellate courts toward the interjection of irrelevant personalities and appeals to prejudice or passion in final argument, has been so clearly stated in many cases as to call for no further discussion. New York Central R. Co. *v.* Johnson, 279 U. S. 310, 317-319, 49 S. Ct. 300, 73 L. Ed. 706; Union Pacific R. Co. *v.* Field, 8 Cir., 137 F. 14; Brown *v.* Walter, 2 Cir., 62 F. 2d 798; F. W. Woolworth Co. *v.* Wilson, 5 Cir., 74 F. 2d 439, 442, 443, 98 A. L. R. 681; Chicago & N. W. Ry. Co. *v.* Kelly, 8 Cir., 74 F. 2d 31, 36, 37, Id., 8 Cir., 84 F. 2d 569, 573-576; London Guarantee & Accident Co. *v.* Woelfle, 8 Cir., 83 F. 2d 325, 338-344; Palmer *v.* Miller, 8 Cir., 145 F. 2d 926, 932; Chicago & N. W. Ry. Co. *v.* Green, 8 Cir., 164 F. 2d

BLEED THROUGH POOR COPY

55, 64. This Court, in the interest of an orderly administration of justice, will continue to do all that reasonably may be done to assure litigants that a trial in a District Court of the United States shall be so conducted that the verdict of the jury fairly may be assumed to be based upon an impartial consideration of the evidence and the applicable law."

Kroger Grocery & Baking Co. v. *Stewart*, 164 F. 2d 841, 844.

It will be noted that the District Judge did not admonish plaintiff's counsel for his improper argument. When plaintiff's counsel in his concluding argument said "In my weak and humble way I am going to try to get this jury to bring in a verdict in this case that will help the people of Brunswick in some degree by making this arrogant railroad company adopt the Golden Rule in its operation of its railroad. Some of you gentlemen are from Brunswick and some of you are not, but I don't know how many boys have been killed or injured as a result of the operation of this railroad in and around Brunswick. I know of three that were killed in one car, besides this one," (R. 660) and defendant's counsel moved for a mistrial, all the trial court said was: "Gentlemen of the jury, of course any other accident that might have happened in connection with the Atlantic Coast Line Railroad Company would not be admissible in this case. So, you gentlemen confine yourself to the evidence in this case, and don't consider any statement counsel made about that" (R. 661). When counsel for plaintiff closed his argument, he asked the jury to "bring in a verdict in terms of the law in this case that (will?) shock this company into doing something about this operation" (R. 675). When defendant's counsel made a motion for a mistrial because of the prejudicial and inflammatory argument, the trial court out of the presence

of the jury in overruling the motion said: "I am going to instruct the jury that counsel have to be confined to the evidence, and to disregard any statement by counsel on either side, if any were made, for prejudicial purposes, and of course the jury would not render a verdict to shock anyone, but shall render a verdict according to the evidence and the law as given them in charge" (R. 676), but even this statement which implied that counsel for each side were guilty of making prejudicial statements was not given to the jury. What the trial court actually said when the jury came back was: "Now, gentlemen of the jury, before I commence to charge you, I want to instruct you to disregard any statements made by counsel relative to any matter other than the evidence that has been presented to you. Now, sometimes counsel may inadvertently make some statement that has no connection whatsoever with the case on trial, but you disregard any such statements and confine yourself solely to the evidence as presented in this case and the law as given you in charge by the Court. You just disregard entirely any statements that might have been made by either counsel in this case that is not supported by the evidence in this case" (R. 678). Not one word with reference to inflammatory or prejudicial argument. Not one word of rebuke to plaintiff's counsel for having indulged in such conduct. As a matter of fact the trial court did not at any stage of the trial ever reprimand plaintiff's counsel for any of the "out of bounds" conduct. This Court has held the public interest required the trial court of its own motion to protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.[1] Where timely objections were accom-

[1] *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706; *Viereck* v. *U. S.*, 318 U. S. 236, 247, 87 L. Ed. 734, 741; *Union Pacific R. Co.* v. *Field*, 8 Cir., 137 F. 14, 15; *Missouri K-T R. Co.* v. *Ridgway*, 191 F. 2d 363, 369.

BLEED THROUGH POOR COPY

panied by repeated motions for mistrial but the appeals to passion and prejudice went unrebuked[1] the Court of Appeals correctly found that the trial had been conducted "out of bounds".

Petitioner's brief mentions that the portion of plaintiff's counsel's argument contending for punitive damages (R. 136) was made while the jury was out of the room, but they conveniently overlook the fact that the same argument was made later by counsel in the presence of the jury (R. 151). When plaintiff's counsel made this statement in the presence of the jury, defendant's counsel objected, but the court permitted the argument to stand. Thus the statement in petitioner's brief that the "major part of the court's findings of prejudice to the jury was based * * * upon matter that was not before the jury" is not true. The matter was before the jury and plaintiff's counsel stressed it, even though on the first appeal the Court of Appeals had held this was not a case for punitive damages.

Conclusion.

1. Plaintiff's counsel is himself responsible for the second reversal of this case by his deliberate disregard of the rulings made by the Court of Appeals on the first appeal.

---

[1] The first motion for mistrial was overruled without any rebuke to counsel for plaintiff for prejudicial argument; in fact, the Court seemed to find the statements all proper except that plaintiff's counsel had once represented the Southern Railway (R. 142). The second motion for a mistrial was overruled with a statement implying that the trial court thought the argument of plaintiff's counsel proper (R. 161). The third motion for mistrial was also overruled without any rebuke or admonition to plaintiff's counsel (R. 174). The fourth and fifth motions for mistrial have been dealt with before in this brief. They will be found at R. 661 and R. 677.

2. The decision of the Court of Appeals is right and amply supported by the record and the decisions of this Court. Further review is not warranted.

3. The petition for the writ of certiorari should be denied.

If for any reason this Court should see fit to grant the petition and issue the writ of certiorari, we respectfully request that we be given an opportunity to be heard on the merits of the case.

CHARLES L. GOWEN,
CHRIS B. CONYERS,
Attorneys at Law for the Respondent,
Post Office Address:
National Bank of Brunswick Building,
Brunswick, Georgia.

BLEED THROUGH POOR COPY